1983 WL 182034 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 20, 1983

***1** Steven W. Hamm
Administrator
S. C. Department of Consumer Affairs
Post Office Box 5757
Columbia, South Carolina 29250-5757

Dear Mr. Hamm:
You have requested our opinion concerning the constitutionality of a provision of § 153 of the 1983-84 Appropriations Act (Act No. 151 of 1983) which provides as follows:
Notwithstanding any other provision of the law, when a vacancy occurs in a State Agency, other than the institutions of higher education, or when an agency acts to fill a new position, the agency shall give preference to residents of this State who are qualified for the vacancy or new position.

It is the opinion of this office that a court most likely would declare this statutory preference unconstitutional.

As you note in your letter of September 30, 1983, requesting this opinion, we have previously addressed this resident preference provision. In an opinion dated August 5, 1983, to Dr. Jack S. Mullins, Director, State Personnel Division, we ruled that this provision
requires that, in filling vacant or new positions, if a South Carolina resident has applied for the position and meets the minimum qualifications for the job, the South Carolina resident shall be appointed to the position notwithstanding that there are non-resident applicants for the position who are better qualified for the position than the South Carolina resident.

This opinion was issued in response to Dr. Mullins' question as to what state agencies were required to do in order to satisfy the requirements of the resident preference legislation. The constitutionality of this provision was not then before us, and we noted in that opinion that ‘we express[ed] no opinion as to the constitutionality of this legislation.’ Your inquiry squarely presents this issue for resolution.

A number of states and municipalities have, by statute or ordinance, attempted to condition eligibility for public employment on residency within the state or municipality for a prescribed period. These so-called durational residency requirements, where challenged, have been universally condemned by the courts as violative of the Equal Protection Clause of the Fourteenth Amendment. E.g., Nehring v. Ariyoshi, 443 F.Supp. 228 (D.Haw. 1977); Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977), reversed on other grounds 437 U.S. 518 (1978); Eggert v. City of Seattle, 81 Wash.2d 840, 505 P.2d 801 (1973). The courts have held that such residency requirements impair the fundamental constitutional right of citizens of the United States to travel freely among the several states and that the classification by the state of persons based on this exercise of such a fundamental right cannot survive the strict judicial scrutiny to which such class-based legislation is subject.

Similarly, statutes affording a preference in consideration for public employment to those residents of a state who have been residents for a specified minimum period or longer have been struck down. See, e.g., State v. Wylie, 516 P.2d 142 (Alaska 1973). In ruling such preference legislation as an unconstitutional infringement of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the courts have employed the same analysis as has been applied in striking down statutes

conditioning eligibility for public employment on residency within the state for a prescribed minimum duration. Thus, such preference legislation has been deemed to be constitutionally infirm because it penalizes persons who exercise their fundamental constitutional right to migrate from state to state and does not serve any compelling governmental interest or, if it does, does not do so in a manner which least impedes the exercise of the fundamental right to travel interstate. Id., 516 P.2d 146-150.

***2** Prior to June of 1978, however, it was not clear that a state could not legitimately require bona fide residence (i.e., physical presence within the state and the intent to remain therein indefinitely as manifested by such indicia as registration of vehicles within the state, registering to vote within the state, etc.) within the state as a condition for eligibility for consideration for public employment. For example, in State v. Wylie, supra,, the Alaska Supreme Court, after invalidating Alaska's one year residency hiring preference commented:

It is worth noting here that appelled does not challenge the state's interest in preferring bona fide residents over non-residents in selecting employees for public service. [1]

516 P.2d at 150. And in Eggert v. City of Seattle, supra, in which the Washington Supreme Court rejected a Seattle ordinance imposing a one year residency requirement on applicants for the municipal civil service, the court observed:

[The durational residency requirement does penalize recent travel by completely and unconditionally depriving those recently migrated to the city, regardless of their status as bona fide residents, of the right to apply for employment [with the city].

505 P.2d at 805 (emphasis added).

There was, however, contrary authority. For example, in Pittsburgh Federation of Teachers v. Aaron, 417 F.Supp. 94, 96 (W.D.Pa. 1976), where the court rejected a teachers' union challenge to a school board rule making residency within the school district after hire a condition of continuing employment, the court commented by way of dictum:

Certainly, if Pennsylvania law provided that Pennsylvania employees should employ none but residents of Pennsylvania such a law would have to be stricken down as abridging the privileges and immunities of United States citizens and denying equal protection of laws.

Jenkins v. McCollum, 17 E.P.D. (CCH) ¶8457 (N.D.Ala. 1978), too, was at odds with the dictum in Wylie and Eggert. In Jenkins, a County Commission received 18 applications for the position of Manpower Director. Sixteen of the applicants resided within the county and two resided elsewhere (and, inferentially, outside the State of Alabama). The Commission refused to consider the applications of the two non-residents. These two applicants sued, claiming, among other things, that the Commission's refusal to consider them deprived them of one of the privileges of a citizen of the United States, namely, the right to travel about the country freely. They maintained that, as non-residents, they had a constitutional right to apply for public employment with Tuscaloosa County and to be considered therefor. The court agreed, saying: 'It is this court's opinion that any prior requirement of residence would violate this constitutionally protected privilege of a citizen of the United States [i.e., the right to travel freely among the states].' 17 E.P.D. ¶ 8457 at p. 6366. (emphasis added). [1]

***3** On June 22, 1978, in Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397, the Supreme Court of the United States resolved the issues of whether bona fide residence within a state can be constitutionally required as a precondition to consideration for employment and whether a hiring preference can constitutionally be accorded residents of a state. At issue in Hicklin was an Alaska statute which required that preference in hiring for jobs on the Alaska Pipeline be given to qualified Alaska residents. A statute defined 'resident' as including, inter alia, physical presence within the State of Alaska for one year. The so-called 'Alaska Hire' statute was challenged by a group of plaintiffs, including several non-residents of Alaska, as being violative of the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause, Art. IV, § 2, of the United States Constitution. Consistent with its earlier ruling in State v. Wylie, supra, the Alaska Supreme Court held that the one year durational residency requirement violated the Equal Protection Clause because it established a classification based on the exercise of a fundamental right (the right to travel interstate) which classification did not further compelling state

interests in a manner least restrictive of the right to travel. Hicklin v. Orbeck, 565 P.2d 159, 162-164 (1977). The Alaska court, however, rejected the non-resident plaintiffs' contention that a statutorily-mandated preference for bona fide residents over non-residents was constitutionally impermissible. Id., at 166-169. The United States Supreme Court reversed this aspect of the Alaska court's ruling and held that granting a hiring preference to residents violates the Privileges and Immunities Clause. The Court emphasized that, under the provisions of that clause,

A resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State.

437 U.S. at 525. Although Hicklin involved a statute which was directed at private employers and did not apply to public employment, see Hicklin v. Orbeck, supra, 565 P.2d at 161, there is no reason to believe that the holding in that case would have been any different had the statute been aimed only at public employers, as the South Carolina resident preference legislation is. [2]

Of course, a statute can only be declared unconstitutional by the courts. In light of the United States Supreme Court's ruling in Hicklin v. Orbeck, however, it is our opinion that a court would most likely declare unconstitutional the hiring preference for qualified residents conferred by § 153 of the Appropriations Act.

Sincerely,

Vance J. Bettis
Assistant Attorney General

Footnotes

1 Preferring residents over non-residents [as opposed to preferring residents of a specified duration over residents of less than that duration] apparently does not penalize 'travel,' as the Supreme Court uses that term. [citations omitted].

1 The court recognized that the County Commission could, if it desired, require that whoever was appointed to the position of Manpower Director become a resident of the county upon appointment. Id. citing McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976). Similarly, the court acknowledged that a public employer could legitimately consider an applicant's familiarity with the area (state, county, or municipality) by reason of present or past residence in that area as one factor in determining which applicant is best qualified for the job being filled. Id. Hicklin v. Orbeck, 437 U.S. 518 (1978), discussed post at page 5, does not hold otherwise; therefore, this dictum from Jenkins is still good law.

2 Interestingly, in the 1976 case of McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed.2d 366, wherein the Supreme Court had upheld the validity of philadelphia's requirement that its municipal employees reside within the city limits after hire, the Court commented, in dictum:

[In none of our cases] have we questioned the validity of a condition placed upon municipal employment that a person be a resident at the time of his application.

Id., 424 U.S. 646 (emphasis added). This dictum, which is consistent with the similar sentiment expressed by the Alaska court in Wylie and the Washington court in Eggert, is inconsistent with the Court's ruling in Hicklin and, therefore, must be regarded as having been overruled by Hicklin.

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